2. That "the fact cannot be avoided that, *at least for purposes of the favored nation clause,* the 'entering of a contract for the purchase of gas' has not been accomplished until the price has been established."

3. That, although the Commission's conclusion was "abstractly conceivable", such a conclusion would take the law out of the "realm of business practicalities" and that it was more in line with the "realities of the situation" to say that complete performance of the 1943 Atlantic contract required the parties to enter into subsequent contracts.*

Reasons for Granting the Writ

1. Important Question With a Dangerous Impact upon the Consuming Public, the Commission and other Agencies

The Commission is often required to interpret various agreements committed to regulation. Here presented is the first decision by the full Commission interpreting the meaning of a rate schedule of an independent producer of natural gas, as required by the Court's *Phillips* decision (347 U. S. 672). Over 10,000 such rate schedules are now on file, and over 6,000 rate increase filings have been submitted, each one proceeding on the theory that the rate increase is authorized under the terms of the contract. The Commission is entering an era when questions of interpreting rate schedules of independent producers are arising with increasing frequency.**

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* The Court of Appeals did remand the case to the Commission, but solely on the issue of whether the price paid by Texas Gas to Atlantic was in fact "higher" when various factors are taken into account as required by the escalation section (App. A., p. 6a).

** In addition to the numerous proceedings in which disputes over interpretation will undoubtedly arise at time of hearing, the following are 26 illustrative cases where such issues are already

KEY TO BRIEFS

1 PETITION FOR A WRIT OF CERTIORARI

2 PETITION FOR A WRIT OF CERTIORARI

3 BRIEF OF SHELL OIL COMPANY IN OPPOSITION.

4 PETITIONERS' REPLY BRIEF

5 BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

6 BRIEF FOR THE FEDERAL POWER COMMISSION

7 BRIEF OF SHELL OIL COMPANY.

8 REPLY BRIEF FOR PETITIONERS TEXAS GAS TRANSMISSION CORPORATION AND LOUISVILLE GAS AND ELECTRIC COMPANY

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 167

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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July 1, 1959

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finding is one exclusively reserved or delegated to the Commission.*

As precisely summarized in *Florida* v. *United States*, 282 U. S. 194, 215:

> "In the absence of such findings, we are not called upon to examine the evidence in order to resolve opposing contentions as to what it shows or to spell out and state such conclusions of fact as it may permit. *The Commission is the fact-finding body and the Court examines the evidence not to make findings for the Commission* but to ascertain whether its findings are properly supported."

To the same effect: *SEC* v. *Chenery Corp.*, 318 U. S. 80, 88; *FTC* v. *Algoma Lumber Co.*, 291 U. S. 67, 73; *Crolley* v. *Tatton*, 249 F. 2d 908, 911 (5th Cir. 1957), *cert. denied*, 356 U. S. 966; *Morand Bros. Beverage Co.* v. *NLRB*, 204 F. 2d 529, 532 (7th Cir. 1953), *cert. denied*, 346 U. S. 909; *Willapoint Oysters, Inc.* v. *Ewing*, 174 F. 2d 676, 685-86, 689 (9th Cir. 1949), *cert. denied*, 338 U. S. 860; *Saginaw Broadcasting Co.* v. *FCC*, 96 F. 2d 554, 563 (D. C. Cir. 1938), *cert. denied*, 305 U. S. 613.

The Court has noted that Section 19(b) of the Natural Gas Act (App. B) is one of the statutes prohibiting the Court of Appeals from making findings. *Colorado-Wyoming Gas Co.* v. *FPC*, 324 U. S. 626, 634.

Of course, the stern prohibition against court-made findings applies where the question involves the proper interpretation of a rate schedule. The need for an exercise of

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* Thus, even when the administrative agency for any reason does not make pertinent findings in the first instance, the court's power is limited to remanding the case to the agency to permit it to make the requisite findings. *FPC* v. *Idaho Power Co.*, 344 U. S. 17, 20; *Sunray Mid Continent Oil Co.* v. *FPC*, 353 U. S. 944. The Congressional policies underlying this separation of power are too familiar to require extended repetition.

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IN THE

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OCTOBER TERM, 1959.

No. .....

TEXAS GAS TRANSMISSION CORPORATION and LOUISVILLE GAS AND ELECTRIC COMPANY,

Petitioners,

v.

SHELL OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Texas Gas Transmission Corporation (Texas Gas) and Louisville Gas and Electric Company (Louisville) pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit entered on January 27, 1959.

A petition for a writ of certiorari is also being filed on behalf of the Federal Power Commission (Commission).

Opinion and Orders Below

The opinion of the Court of Appeals (App. A hereto) is reported at 263 F. 2d 223. The order of the Commission (R.

2116-25*) appears at 18 F. P. C. 617, 22 P. U. R. 3d 94; its denial of rehearing (R. 2149-54) is reported at 19 F. P. C. 74, 22 P. U. R. 3d 101.

Jurisdiction

The judgment of the Court of Appeals was dated and entered on January 27, 1959 (App. A, p. 7a).

Timely petitions for rehearing were filed and were denied by the Court of Appeals by order dated March 4, 1959 and entered March 5, 1959 (App. A, p. 8a). By order of Mr. Justice Brennan dated May 25, 1959, the time for filing this petition was extended to and including July 2, 1959.

The jurisdiction of the Court is invoked under 62 Stat. 928, 28 U. S. C. §1254(1) and Section 19(b) of the Natural Gas Act, 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. A. §717r(b) (Supp. 1958).

Questions Presented

In reversing a Commission order interpreting a gas purchase contract filed as a rate schedule under the Natural Gas Act, the Court of Appeals made its own independent and final interpretation. In the process of its decision, that court made de novo findings of extrinsic facts, such as subjective intention and business practicalities, none of which had been passed upon by the Commission.

The questions presented are:

1. May the reviewing court

   a. Interpret anew the meaning of a rate schedule, or is it limited to a determination of whether the Com-

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* Record references (other than to the opinion of the Court of Appeals printed as App. A) are to the pages of the original record before the Commission. Those page numbers are prominently shown in the Joint Appendix in the court below which is being filed with this Petition.

mission's interpretation is supported by evidence and has warrant in law?

b. Make independent findings of fact or an evaluation of industry practice and usage?

2. When a gas rate schedule limits "favored-nation" rate increases to higher prices paid under gas purchase contracts entered into subsequent to its date, does a price redetermination—made under a contract entered into prior to that date—fall within that limitation?

Statutes Involved

The statutes involved are Section 19(b) of the Natural Gas Act, 52 Stat. 831 (as amended, 72 Stat. 947), 15 U. S. C. A. §717r(b) (Supp. 1958), and Section 10(e) of the Administrative Procedure Act, 60 Stat. 243, 5 U. S. C. §1009(e), which are printed in full as Appendices B and C hereto.

Statement of the Case

This case involves review of an order of the Commission determining the rate effective on June 7, 1954 under a contract filed with the Commission by Shell Oil Company (Shell) as a gas rate schedule as required by the Commission's regulations (18 C. F. R. §§154.92-94 (Supp. 1958)) issued pursuant to *Phillips Petroleum Co.* v. *Wisconsin*, 347 U. S. 672.

Texas Gas, an interstate gas pipeline company, intervened in these proceedings because it was the purchaser under the rate schedule.* Louisville, a customer of Texas Gas, was an intervenor because a decision in favor of Shell

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* The original party to the Shell contract was a subsidiary of Texas Gas, Louisiana Natural Gas Corporation, which was later merged into Texas Gas. For convenience, "Texas Gas" will be used throughout this Petition to refer to both the parent and subsidiary.

would have an adverse effect upon the ultimate consumers served by Louisville.

The petition filed by the Commission properly sets out the facts. This petition will only restate those key facts essential to an understanding of the general questions presented.

The Shell contract, executed in 1951, contains a favored-nation clause which reads as follows:

> *"If at any time after December 31, 1951, Buyer shall enter into a contract providing for the purchase by it of gas* produced from a field or fields located, and delivered to Buyer, within a radius of fifty (50) miles of any point of delivery provided hereunder, Buyer shall forthwith notify Seller of such fact, and if the price per one thousand (1000) cubic feet at any time payable under such other contract is higher than the price payable hereunder, each price payable hereunder which is less than the price payable at the same time under such other contract shall be immediately increased so that it will equal the price payable under such other contract. In determining whether the price payable under such other contract is 'higher' than the price payable for gas under this contract, due consideration shall be given to the provisions of this contract as compared with such other contract as to quality of gas, delivery pressures, gathering and compressing arrangements, quantity, provisions regarding measurement of gas, including deviation from Boyle's Law, taxes payable on or in respect of gas delivered and all other pertinent factors." (R. 239-40).*

In September 1943, Defense Plant Corporation** entered into a 25-year gas purchase contract with Atlantic

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* Emphasis is supplied throughout this petition.

** This contract was assigned to Texas Gas in 1949 (R. 287).

Refining Company (Atlantic) (R. 267-79) which fixed the rate to be paid for gas delivered thereunder during the first five years and provided that, at the beginning of each subsequent five-year period, the parties were to reach an agreement as to the price "after a survey of prevailing prices for gas being sold in similar quantities in the southwestern part of Louisiana" (R. 270-71). If the parties were unable so to redetermine the price for any such period, the contract did not terminate but such redetermination was to be made by arbitration (R. 271, 276-77).

Before the Commission, Shell claimed that such a price redetermination between Texas Gas and Atlantic, completed in February 1954 (R. 132), operated to increase or "trigger" the Shell rate under the above favored-nation clause.

The Commission (unanimously reversing the Examiner) rejected Shell's claim, ruling that the "future contract" provision of the favored-nation clause limited its scope to higher prices paid under contracts entered into after 1951, and did not cover price redeterminations pursuant to a pre-1952 contract (R. 2118-21). Among the Commission's reasons was the marked difference in terminology employed in this and other gas purchase contracts (Order Denying Rehearing—R. 2151-52).

Upon Shell's petition for review, the Court of Appeals reversed the Commission's order. It construed the contract de novo, and, in so doing, made findings (App. A, pp. 4a-6a) which may be summarized as follows:

> 1. That the "usual objective" of a favored-nation clause is "to assure the seller a *top price* for its gas", and then, interpreting certain testimony, that these "facts tend strongly to demonstrate that the intention of the parties was for *any higher price*" to trigger a Shell price rise (with one possible exception).

At the outset of this sizeable task of interpreting producer rate schedules, it is imperative that the Court make clear the proper division of function between the courts and the Commission. The decision below illustrates that, otherwise, the reviewing courts will not content themselves with ascertaining whether the administrative interpretation is supported, nor will they adhere to the prohibition against independent judicial appraisal of evidentiary material and industry practice. Compare also, e.g., *FTC* v. *Sewell*, 353 U. S. 969; Jaffe, *Judicial Review: Question of Fact*, 69 Harv. L. Rev. 1020, 1029 (1956). If unchecked, such tendencies obviously have the capacity to frustrate the essential aims of the administrative process—uniformity of interpretation and full utilization of specialized agency expertise.

In addition, the Court of Appeals' ruling on the merits will have a broad and unsettling effect upon the natural gas industry. "Favored-nation" clauses are extensively used in producer rate schedules.* The court below has told

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presented: *Amerada Petrol. Co.* (Docket No. G-16117); *Atlantic Ref. Co.* (G-18565); *id.* (G-18752); *F. G. Blackwood* (G-18515); *Cabot Carbon Co.* (G-18842); *id.* (G-18844); *Continental Oil Co.* (G-18566); *J. L. Hamon* (G-18327); *Herd O. & G. Co.* (G-18769); *Hassie Hunt Trust* (G-18093); *H. L. Hunt* (G-18092); *id.* (re Sched. Nos. 6 & 15; protest filed 5/11/59); *Hunt Oil Co.* (G-18068); *W. H. Hunt Trust Estate* (G-18091); *Monterey Oil Co.* (G-18568); *Peerless O. & G. Co.* (G-18701); *Phillips Petrol. Co.* (G-1148, *et al.*: initial decision of 4/6/59, pp. 305-10); *id.* (G-10908, *et al.*); *id.* (G-14115); *Pure Oil Co.* (G-17930); *Sinclair O. & G. Co.* (G-18326); *Shell Oil Co.* (G-18845); *G. Stratton, Jr.* (G-18692); *Warren Petrol. Corp.* (G-18467); *id.* (G-18517); *id.* (G-18560).

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* A Commission Staff study of contracts in the Gulf Coast area filed by the spring of 1959 shows that 1545 of those contracts—or 46%—had favored-nation clauses (see Commission's petition for a writ of certiorari, p. 18). The great public importance of such favored-nation provisions is revealed in a pending proceeding before the Commission in which those favored-nation provisions involve, directly and indirectly, annual increases in excess of

the Commission and the industry that the "usual purpose" of such clauses—regardless of how they are worded—as well as the intention of the parties to long term contracts using such provisions, "is to assure the seller of a top price for its gas". Its sweeping findings of "usual purpose" and intention, in effect, fix the meaning of all favored-nation clauses, despite variations in their language.

In fact, the plain result of the decision below would be the practical elimination of hundreds of provisions using the type of limitation which is here in issue. In the Gulf Coast area, *the "future contract" limitation now appears in 580 other rate schedules,* involving scores of other producers and numerous pipeline companies.* In that area, this limiting condition is employed in over 1 out of every 3 favored-nation clauses.

The wide and disruptive influence of the lower court's decision is a classic illustration of the vice of unlimited review. The ultimate fruit would be unwarranted rate increases by producers which must be passed on to the

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$35,000,000. *Pure Oil Co.* (Docket No. G-17930; order of 5/12/59). The Commission noted: "*The wide-spread use of favored-nation devices, the successive claims of their being activated and their broad national effect, give cause for grave concern.* The favored-nation system of contracting appears to cause prices to rise in concert. In the United States, concerted price changes when brought about through arrangements among vendors in an industry have always aroused public apprehension. They have long been regarded by the Congress as phenomena requiring the closest scrutiny from those agencies charged with surveillance of commerce in the public interest."

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* From the Staff study referred to in the preceding footnote. The "future contract" limitation appeared in 17% of all such contracts, and 37% of those having favored-nation provisions. Due to the prevalence of both price redetermination provisions and the "future contract" limitation, several other cases have already arisen presenting the issue of whether price redetermination is a new contract. *W. H. Hunt Trust Estate* (Docket No. G-18091); *H. L. Hunt* (G-18092); *Hassie Hunt Trust* (G-18093); *Atlantic Refining Co.* (G-18752).

"burner-tip" consumers, as well as needless proceedings before the Commission and the courts.

Moreover, besides reaching an independent and final conclusion as to the meaning of the rate schedule, and making de novo findings of fact and of industry practicalities, the Court of Appeals failed to make any real attempt to analyze the written terms of the schedule or the other evidence supporting the administrative order, and did not make even a gesture of deference to the Commission's special qualifications. That court apparently believed that it could retry the case as though the Commission had never passed on the question. Such a precedent obviously does not bode well for any other administrative agency.

2. Trial De Novo A Serious Departure From Proper Scope of Review Proceedings

The Court May Not Substitute Its Interpretation of the Rate Schedule For That of the Commission

As the Court has recently held in *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.*, 358 U. S. 103, 114, the function of the court in reviewing an administrative interpretation of a rate schedule is limited. The court must of course inquire whether the Commission followed accepted legal principles and whether the record supports the agency's view. But, the court may not do more. Because this question "involves matters peculiarly within the area of the Commission's special competence," the court may not decide that the agency's reading is incorrect merely because the court would reach a different result, and it certainly may not find the meaning for the Commission.

In this respect, the decision below is in conflict with the principles laid down in the *Memphis* case, as well as those

followed in *United States* v. *ICC*, 198 F. 2d 958, 963-64, 975 (D. C. Cir. 1952), *cert. denied*, 344 U. S. 893. Cf. *Phillips Petroleum Co.* v. *FPC*, 258 F. 2d 906, 918 (10th Cir. 1958).

Nowhere did the court below attempt to discuss the principles which should guide the Commission in ascertaining the meaning of the rate schedule. Neither did it review any of the evidence supporting the Commission's order. Instead, that court forged ahead and reached an independent conclusion, as though it were the tribunal of first instance.

In fact, the failure of that court to quarrel with any principle of law followed by the Commission is itself reason for affirmance of the Commission. Similar significance attaches to that court's agreement that, "abstractly", the Commission's view was acceptable. This is tantamount to a holding that the Commission's order is not contrary to law.

The Court of Appeals' real quarrel was with extrinsic facts and the business setting. Even in this respect, there was no attempt to review the whole record or to weigh the evidence which supports the administrative order.

Moreover, the several instances in which the court below made its own findings of fact and of business practicalities constitute such an extreme departure that it, by itself, is a serious and independent reason why the Court should act in this case.

Reviewing Court Has No Power to Find Facts

Affirmative fact finding by a reviewing court (absent a statutory provision for a trial de novo) has been condemned repeatedly by the Court and the Courts of Appeals. Under statutes such as the Natural Gas Act where agency findings are conclusive if adequately supported, the role of fact-

the Commission's special competence is most compelling when, as the Court of Appeals has ruled in this case, the interpretation depends either upon evaluation of parol or other evidence dehors the written contract, or upon business practicalities in this industry. Cf. *United States* v. *Western Pacific R. R.*, 352 U. S. 59, 67.

3. Court's De Novo Interpretation Revised the Rate Schedule

It is respectfully submitted that the present deviation from the proper function of the reviewing court makes painfully clear the wisdom of the rule against a trial de novo in the Court of Appeals. We believe that the terminology of the "future contract" limitation is so clear, or at the very least so amply supports the Commission's order, that the order must be sustained.*

Nonetheless, without any real discussion of the meaning or purpose of the limitation requiring entry into a future

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* If reference to extrinsic data is thought to be desirable, the Commission's expert reliance in its order denying rehearing (R. 2151-52) upon the marked difference in terminology between the present contract and other contracts in the record should be sufficient. In addition, the record contains numerous acts by Shell between March and October 1954 acquiescing in the unescalated rate or admitting that it had not increased, even though it had actual knowledge of the Atlantic price redetermination (R. 48-49, 147-218, 221). Even after raising the question (R. 122, 222), Shell on three occasions in 1956 and 1957 again admitted that the lower rate was proper in three statements to public accountants auditing the Texas Gas books (R. 224-26). Such extrinsic evidence is given great weight when there is doubt as to the meaning of the written word. See, e. g., *Old Colony Trust Co.* v. *Omaha*, 230 U. S. 100, 118. Before reliable findings could be made on the issues passed upon by the Court of Appeals, an adequate record would have to be made on those questions. This was not done in the first instance (and properly so) because such findings were and are unnecessary in view of the plain language of the rate schedule. Thus, for example, neither the Examiner nor the Commission passed upon them, and Shell itself did not urge them in its petition for rehearing before the Commission (R. 2129-44).

contract, the Court of Appeals by-passed the Shell schedule itself and, instead, addressed itself to parol evidence, subjective intention of the parties and other extraneous matters. The impropriety of not first analyzing the written word is fundamental. E.g., *Simpson Bros.* v. *District of Columbia,* 179 F. 2d 430, 434 (D. C. Cir. 1949), *cert. denied,* 338 U. S. 911.

Even worse, the court's findings that the usual objective of a favored-nation provision and the parties' intention was to give Shell the benefit of every higher price would do away entirely with the "future-contract" limitation. So would the finding or conclusion that "for purposes of the favored nation clause" establishment of price, *by whatever means,* is entry into a contract.* The requirement of entry into a new contract would be replaced by an unrestricted grant of every higher price paid by Texas Gas. The limiting clause "enter into a contract" would be radically changed to read "pay a higher price", and would really then become entirely superfluous. Cf. *United Gas Pipe Line Co.* v. *Memphis Light, Gas and Water Div.,* 358 U. S. 103, 115-16 n. 10.

As indicated by the broad industry use of this type of limitation, the decision below cannot be shrugged off as

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* It seems clear that the reference by the court below to "purposes" meant its previously stated findings that the aim is to grant the highest price (App. A., pp. 4a-5a). But, even if this were a ruling of law, it could not be upheld in the face of the universally accepted doctrine that a contract is valid and enforceable when, instead of specifying price in dollars and cents, price is to be fixed by applying a yardstick or by a third party under an arbitration or appraisal provision. Re price yardstick, see e. g. *Col-Tex Refining Co.* v. *Coffield & Guthrie, Inc.,* 196 F. 2d 788, 790-91 (5th Cir. 1952); 5 Williston, *Contracts* §574 (rev. ed. 1937). Re arbitration or appraisal, see e. g., *Red Cross Line* v. *Atlantic Fruit Co.,* 264 U. S. 109, 121; *Texas Co.* v. *Z. & M. Independent Oil Co.,* 156 F. 2d 862, 866-67 (2d Cir. 1946); 5 Williston, *Contracts* §1421, at 3967-68 (rev. ed. 1937); 6 Williston, *Contracts* §1921A (rev. ed. 1938); 1 Williston, *Sales* §176 (rev. ed. 1948).

merely ignoring terms which were chosen by accident or as rejecting a semantic argument which capitalized on chance phraseology. There is even more behind the "future-contract" restriction than the fact that the number of rate increases is kept down—important as that is for the consuming public. The substantive economic purpose of this limitation is to permit the purchasing pipeline system to keep in its own hands a large measure of control over its future cost of gas.

Under the limitation, no escalation takes place unless the pipeline company decides to enter into a new contract. This gives the purchaser the important opportunity of weighing and forestalling favored-nation side-effects. Such an opportunity is denied the purchaser under the less limited clause when it is also caught by rate increases forced by obligatory escalation under prior contracts (such as the Atlantic price redetermination).

Therefore, the decision below, in enabling obligatory increases to trigger a rate rise despite the new contract restriction, directly frustrates the whole purpose of the limitation.

Atlantic Price Redetermination Is Not Entry into a Contract

Even viewed as though it were a matter of pure contract law, the decision of the court below is simply wrong in its conclusion that the redetermination of price between Atlantic and Texas Gas constituted entrance into a contract. The court assumes that the Atlantic contract is enforceable for its 25-year duration, including Atlantic's obligation to sell and deliver and the parties' reciprocal obligations to redetermine price periodically. Nonetheless, the court, at the same time and with respect to the same instrument, concludes that a series of independent contracts are involved in Texas Gas' obligation to pay the prices

agreed to under the machinery in the basic contract. In capsule, the Court simply states this by saying "*complete performance of the 1943 contract* required the parties to enter into subsequent contracts" (App. A, p. 6a).

When, at the beginning of a 5-year period, Texas Gas and Atlantic renegotiated and agreed upon a higher price, they were not making a wholly *new* "contract". They were mutually agreeing upon a change in price, in accordance with an express provision of their original, and still fully operative, contract.* A failure to agree on this change would not have been a *breach* of contract; but it would have at once brought into operation the provision for arbitration. This is a valid provision binding on both parties. The original contract would still be fully operative; and the price fixed by the arbitrator would now be *the contract price.* No one can doubt that Texas Gas would be bound to pay this new price; and it would be so bound by virtue of the original contract, not by virtue of a *new* contract.

A new price fixed by an arbitrator would certainly not be one fixed by a new contract. The same is true of a new price fixed by redetermination as provided in the original contract. Neither party had power to bind the other to a

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* See *Brassert* v. *Clark*, 162 F. 2d 967, 971-2 (2d Cir. 1947); *Phillips Petroleum Co.* v. *FPC*, 227 F. 2d 470, 475 (10th Cir. 1955), *cert. denied*, 350 U. S. 1005; *McKell* v. *Chesapeake & O. Ry.*, 175 Fed. 321, 328-29 (6th Cir. 1910), *cert. denied*, 220 U. S. 613; *May Metropolitan Corp.* v. *May Oil Burner Corp.*, 290 N. Y. 260, 265, 49 N. E. 2d 13, 15-16 (1943). The court's notion that there are separate contracts disregards the express provisions in the Atlantic rate schedule specifying a price yardstick for the periodic price redetermination, even apart from the provision for arbitration in the event of disagreement. It prescribes that, for the last four 5-year periods, prices will be agreed upon after a survey of "prevailing prices" for gas being sold in similar quantities in southwestern Louisiana (R. 271). Shell's own witness testified under direct examination that this was a binding price standard (R. 78-79). Such a standard is enforceable. See *Cities Service Gas Producing Co.* v. *FPC*, 233 F. 2d 726, 727 (10th Cir. 1956), *cert. denied*, 352 U. S. 911.

new price without the other's assent; and each party was privileged to refuse his assent to any new price if he willed to do so. But here his will is subject to control—he must assent to some new price proposed by the other party or pay what an arbitrator tells him to pay. A party's will is not free if he has a choice between only two limited alternatives like these. He must agree *or else.*

One who is making a *new contract* has a greater freedom than had Texas Gas and Atlantic. He is free to *Assent* or *Not Assent.* This is not a choice between two alternatives; his freedom of choice is *absolutely unlimited.* If he chooses *Not Assent,* he is still as free as before, and under not the slightest degree of legal obligation. Not so Texas and Atlantic. Their alternative *"or else"* had a legal bite.

One who makes a promise like this is not making an "illusory" promise. It is itself an enforceable promise, and it is a sufficient consideration for a return promise.

The foregoing is in exact harmony with the Court's recent decision in the *Memphis* case (358 U. S. 103). In that case, the Court affirmed the Commission's determination that new rate schedules filed by United Gas Pipeline Company did not change *the contract* but merely changed the prices in accordance with the original service contract. This Court held that *no new contract* was necessary to make the new prices effective. The buyer was bound to pay the new prices because his original contract expressly provided that he should. The decision of the Court of Appeals was reversed because it had held the contrary.

The erroneous theory of contract law adopted by the court below is even more startling when it is realized that such theory was developed because of that court's conception of "business practicalities" and "realities of the situation." The lower court's theory might be less startling if there were support in the record for such findings, but this

is not the case here, as noted above, and this void merely points up the wisdom of the rule that reviewing courts may not interfere with the duly delegated functions of administrative agencies.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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